United States Court of Appeals

for the Second Circuit

APPENDIX

76-4114

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

CHUNG YING CHAU,

Petitioner,

Docket
No.76-4114

-against-

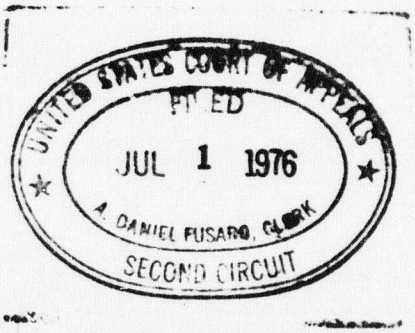
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

APPENDIX FOR PETITIONER



Submitted by:

STEVEN S. MUKAMAL
Counsel for Petitioner
Barst & Mukamal
127 John Street
New York, New York 10038
212 952-0700

CONTENTS OF APPENDIX

PAGINATION AS IN ORIGINAL COPY

Form I-215B
(Rev. 9-1-72)Y

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT IN AFFIDAVIT FORM

AFFIDAVIT

IN RE: Chung Ying Chau _____ FILE NO. A21 771 341
EXECUTED AT NYC _____ DATE Sept. 10, 1974
Before the following officer of the U.S. Immigration and Naturalization Service:

in the English language. Interpreter Chinese used.

I, Chung Ying Chau, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding: My application for adjustment of status

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent.
Anything you say can be used against you in court, or in any immigration or administrative proceeding.
You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

I hereby state that my true and correct name is Chung Ying Chau. I was born in Foochow, China on May 7, 1974. I am a citizen of Taiwan Republic of China. I first arrived in to the United states on January 1967 as a seaman on board the SS "Limbur" at the port of Los Angeles, California. I abandoned the ship and remained in the United States without permission of the Immigration Service. I was arrested by the Immigration Service on February or March 1968. I was released on $2500.00 bond posted by a friend of mine. Iwas given Voluntary Departure by the Immigration Service. I didn't comply with this order. On march 1971 I was escorted to board an aircraft by an officer of the Immigration Service. The flight was destined to Tokyo, Japan. I am not sure of this enforced departure from the United States was a deportation or what other action by the Service. I returned back to the United States on January 6, 1973. The purpose of my trip to the U. S. as Itold the American Consul in Hong Kong was to visit frients and to look into some business. I wanted to invest money in a restaurant and I needed an English speaking partner. I first went to the American Consulate to apply for a visa about the summer of 1972. The consul ask me to give him the name of the Travel Agency who had filled my application and as I could not give wan because the application had been filled out by a friend of mine whose name I can not recall now, he denied me a visa. About December of 1972 I was having lunch and talking to an aquaintance and expressed to him my problem in obtaining a visa to go to the U. S. This fellow referred me to TIN YAN TRAVEL AGENCY at Connaught Rd. W. Hong Kong. I paid the person there whom i believe was Mr. Tin Yan $300.00 or $400.00. For this money he filled my application for visa and obtained the visa for me, I didn't go to the consulate this time the agency did everything for me

When I went to the agency they asked for my passport, Iwent home for it and ouldn't find it. I reported it lost to the Hong Kong Police, then I went to the Hong Kong Immigration and got a new one, I delivered this new passport to the agency as they had requested! One week later the agency returned the passport to me together with the visa.

I have read (or have had read to me) the foregoing statement, consisting of ...2.....pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true, and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the correction(s) noted on page(s) .....0.....).

Chan Chung Yin

Signature .....

CHUNG YIN CHAU

Subscribed and sworn to before me at ..NYC, N. Y.....

.....on..September 10, 1974.....

G. J. Rodriguez I.E.

A. J. RODRIGUEZ

Officer, United States Immigration and Naturalization Service

Witnessed by: O. R. Martin I.E.

RECORD OF SWORN STATEMENT

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Form I-263A (Rev. 11-20-63)

A-2

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
20 West Broadway
New York, New York 10007
November 5, 1974 A21 771 341 (245)

Chung Ying Chau
319 East Houston Street
New York,New York

DECISION ON APPLICATION FOR STATUS AS PERMANENT RESIDENT

Upon consideration, it is ordered that your application for permanent resident be denied for the following reasons:

See Attachment:

You must depart from the United States forthwith.

Sincerely yours,

Maurice F. Kilfey
District Director
New York District

Enclosures: I-438
M-188
I-94

A21

The record reflects that you are a native and citizen of China who was last admitted to the United States as a visitor for pleasure on January 13, 1973. The record also shows that you previously arrived in this country at Los Angeles, California on January 21, 1967 as a crewman aboard the SS Limburg and thereafter deserted the vessel. You were apprehended by officers of this Service and subsequently deported to Hong Kong on March 12, 1971. On September 10, 1974 in a sworn statement before an officer of this Service and in the presence of your Attorney you admitted, that you first entered the United States during January 1967 as a crewman aboard the SS Limburg at the post of Los Angeles, California and abandoned the ship remaining here without permission. You also said that in February or March 1968 you were arrested and later released under $2,500.00 bond. You further stated that in March 1971 you were escorted to the airport by an officer of this Service to board a plane for Tokyo. That in the summer of 1972 you went to the American Consul at Hong Kong and applied for a visa and it was denied. That you returned to the United States on January 6, 1973, as a visitor for pleasure, to visit friends and to look into some business. You also stated that the nonimmigrant visa issued at Hong Kong on January 5, 1973 was obtained through the Ting Travel Agency for a fee of approximately $300.00 to $400.00 dollars.

Your application for permission to reapply after deportation was denied on May 4, 1972.

Section 212 (a)(17) of the Immigration and Nationality Act, as amended, states, in part, that any alien who has been deported from the United States is excludable unless, prior to his embarkation at a place outside the United States, the Attorney General has consented to his applying for admission.

Section 245 of the Immigration and Nationality Act, as amended, states, in part, that the status of an alien may be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence and an immigrant visa is immediately available to him.

In view of the above your application is denied since you are ineligible to receive a visa in that you are excludable under section 212 (a)(17) of the Act.

part of allegation Two in that it alleges he is a native of China and it alleges that he is a citizen of the Republic of China on Taiwan. Iam not certain that he is a citizen of the Republic of China on Taiwan, your honor.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Chau Chung, have you ever been the subject or citizen of any other country besides China?

A No.

MR. SINGER: He travels on a Hong Kong Certificate of Identity.

IMMIGRATION JUDGE: Thank you sir.

IMMIGRATION JUDGE: Is there any request for discretionary relief from deportation?

MR. SINGER: Yes, your honor, we are requesting that the application under Section 245 be entertained along with an application for permission to re-apply after deportation and in the alternative, we are requesting voluntary depatture and we will designate Hong Kong as the country of deportation.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Chau Chung Ying, have you ever been arrested or convicted for crime anywhere in the world anytime?

A Not at all.

Q Have you ever been a member of any communist organizations, or the communist party, anywhere in the world at any time?

A No.

Q Have you everhad anything to do with narcotic drugs or marijuana, buying, selling, using, trading, dealing, trafficking or possessing any of those things?

anybody that you had been deported before?

A No, neither did I mention about it, nor was I asked about this.

Q Do you remember being deported from the United States?

A I was asked to leave this country, so I did. Whether I was deported or not, I am not clear.

Q Did you go with your own ticket when you left?

A No, I had not paid for my ticket.

Q Did the government pay for it?

A I don't know who paid for it. I left from here.

Q What do you mean by here?

A When I said here I mean from this immigration office here.

Q O. K. Do you remember signing any type of paper telling you that you would need special permission before you could come back to the United States?

A I don't think so, I don't recall.

Q Did you know whether you needed special permission to come back here on a visit?

A I do not understand this question. If you ask me again I maybe will see what you mean.

Q Did you know that you needed - do you know if you needed permission, other than a visa to come back here?

A What kind of permission?

Q Well why did you come here?

A I wanted to see.

Q What were you going to see?

A Just for pleasure.

A-6

Q According to the records of the Immigration Service you came back to the United States January 13, 1973, is that correct?

A Yes.

Q And according to your Form I-94 you were admitted until April 15, 73.

A I thought I was permitted to remain here for four months.

Q Since you came here for a visit, as you have stated, how come you did not leave the United States?

A Because I wanted to stay I was told I would be hired as a cook by the Dung Hing (spelled) Restaurant, and this restaurant would file an applicatinn on my behalf for my staying in the United States.

Q Do you rememberwhen you came in contact with this restaurant?

A A few months after my arrival, I cannot remember definitely.

IMMIGRATION JUDGE TO RESPONDENT:

Q Sir, is the Dung Hing restaurant the same as the Oriental Loa Restauran-

A Yes.

MR. SINGER TO RESPONDENT:

Q Where are you working now?

A I work at this place.

BY IMMIGRATION JUDGE: Respond ent presents business card of Golden Inn Restaurant (Chinese Restaurant, 146 Amity Road, , New Haven-

Go ahead, Mr. Singer.

MR. SINGER TO RESPONDENT:

Q1Why are you not now working for your sponsor?

A Because the two bosses are good friends, and my present employer needs somebody to work for him, so the boss of the other restaurant was saying that if they succeed to get me permanent residence I will go back to

th original one.

IMMIGRATION JUDGE: The business card just referred to is now returned to respondent.

MR. SINGER TO RESPONDENT:

Q If the Immigration Servic e or the Immigration Judge gives you permission to work will you resume work at the Oriental Loa Restaurant?

A If the present employer can find somebody else, I don't mind to go back to the Oriantal Loa Restaurant to work. Both bosses are good friends.

Q Are you married or single.

A I am married.

Q Where is your wife?

A On the mainland of China.

Q Do you have any children?

MR. DUNLOP: Object.

IMMIGRATION JUDGE: Sustained, we already have that in Exhibit 4, the application for Section 245 relief, unless there be reason for being repetitious.

MR. SINGER: No, I'm sorry, I forgot it was already in.

MR. SINGER TO RESPONDENT:

Q ,How many children do you have, if there has been any change?

A Two one boy and one girl.

Q Thank you.

MR. SINGER: I have nothing further at this point, your honor.

IMMIGRATION JUDGE: Mr. D unlop?

MR. DUNLOP TO RESPONDENT:

Q Sir, you testified that you had no knowledge of the necessity for asking for permission to come into the United States, is that right?

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A21 771 241 - New York

JUN 25 1975

In the Matter of)

CHAU CHUNG YING)

Respondent)

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act - Section 241(a)(2) (8 USC 1251(a)(2)) - remained longer - visitor

APPLICATION: I & N Act - Section 245 (8 USC 1255) - Adjustment of Status; To reapply for admission after arrest and deportation (Section 212(a)(17)) (8 USC 1182(a)(17)); in alternative, voluntary departure

In Behalf of Respondent:

Barst & Mukamal, Esqs.
127 John Street
New York, N.Y. 10038

Stephen Singer, Esq., of counsel

In Behalf of Service:

William Dunlop, Esq.
Trial Attorney

DECISION OF IMMIGRATION JUDGE

Respondent, now 39, alien, native citizen of China, entered the United States January 13, 1973 as a visitor last permitted to remain till November 5, 1974. It is conceded that, without authority, he remained longer and is deportable as charged in the Order to Show Cause issued December 30, 1974 (Exhibit 1).

Respondent asks that he not be deported. He requests, under the provisions of Section 245 of the Immigration and Nationality Act, adjustment of status to that of an alien admitted for permanent residence (Exhibit 4).

However eligibility for that adjustment requires, among other things, that respondent be admissible to the United States (Section 245(a)(2), Immigration and Nationality Act).

Respondent is not now admissible to the United States because prior to his last entry he had been arrested and deported from the United States and does not have the permission required by Section 212(a)(17) of the Immigration and Nationality Act to reapply for admission. He additionally now requests such permission (Exhibit 26).

On November 5, 1974 the District Director, New York, denied respondent's Section 245 application (Exhibit 2). As is his right respondent renewed that application when before us. In considering the renewed application we are not bound by the District Director's denial but must make independent determination (8 CFR 242.17) of whether respondent is eligible for adjustment and, if so, whether adjustment should be granted as a matter of discretion. Respondent's request for permission to reapply for admission after arrest and deportation is a new application, his second. Another District Director had denied (Exhibit 14) respondent's first request for such permission (Exhibit 15). In considering that current request of respondent we likewise will exercise independent judgement.

Respondent's first entry to the United States was January 21, 1967 when he was admitted as a crewman for a 29 day maximum. On April 25, 1968, after a deportation hearing February 19, 1968, respondent was found deportable for remaining longer, was discretionarily denied voluntary departure, and was ordered deported. The Immigration Judge's decision (Exhibit 24)

noted that for income tax purposes respondent claimed more dependents than authorized, that respondent had been given opportunity to make correction but did not do so. On March 12, 1971 respondent was deported (Exhibit 16).*

On January 12, 1972, when in Hong Kong, respondent executed his prior request for permission to reapply for admission to the United States after arrest and deportation. In that application he stated, among other things (Exhibit 15, item 16) that he desired to reenter the United States "(f)or better working opportunities and conditions of living." By letter dated May 4, 1972 to respondent in Hong Kong the application was denied (Exhibit 14).

It is indicated (Exhibit 10) that respondent thereafter obtained a visitor's visa with which he last entered the United States. Since here he received a Department of Labor certification as a specialty cook (Exhibits 11, 12, 13).

Were we to grant respondent's present application for permission to reapply, and were his case fully processed and were he found eligible for Section 245 benefits, that eligibility would not require that those benefits be granted. True, in the absence of adverse facts Section 245 adjustment is ordinarily authorized as a matter of discretion. However, where adverse factors are present they must generally be counteracted by the alien presenting unusual or outstanding equities (Matter of Arai, 13 I&N Dec. 494). Respondent has the burden to so establish (8 CFR 242.17(d)).

---

* Though the April 25, 1968 decision was final, respondent thereafter moved to reopen proceedings. On March 20, 1970 the Board of Immigration Appeals dismissed respondent's appeal from the Immigration Judge's denial of the motion (Exhibit 17).

There is much which is adverse to respondent. This is the second time he stayed here longer than allowed, the second time deportation proceedings were necessitated. As is evidenced from, at least, his application for permission to reapply for admission to the United States after arrest and deportation (Exhibit 26), he knew that that permission was necessary before returning here (cf. also Exhibit 28, "- - - Notice of Penalty for Reentry Without Permission' after deportation). Despite not having that permission, nay despite that permission having been specifically denied, respondent nevertheless did reenter the United States.

What motive would there be for any arrested and deported alien to comply with the entry provisions of law upon return to the United States if despite respondent's failure to do so they now see him rewarded with the benefits of Section 212(a)(17) and 245?

Respondent has no close family ties in the United States. His wife and two children are in China. He has failed, when given opportunity to do so, to correct erroneous federal income tax deductions. Balancing the scales, the favorable side against the unfavorable, there are just too many adverse facts to justify discretionarily granting respondent's request under Section 212(a)(17), or under Section 245 were he statutorily eligible therefor (which he is not because he remains excludable). The requests for the benefits of those sections will be denied.

However as a matter of discretion respondent's alternate request for voluntary departure will be granted. Should that privilege not be exercised

as required deportation will ensue. Respondent designates Hong Kong as his destination if deported. If not acceptable there we are required to name the Republic of China on Formosa as respondent's alternate deportation destination (Section 243(a), Immigration and Nationality Act).

ORDER: IT IS ORDERED that respondent's application, under Section 212(a)(17) of the Immigration and Nationality Act, for permission to reapply for admission to the United States after arrest and deportation be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that respondent's application, under Section 245 of the Immigration and Nationality Act, for adjustment of status to that of an alien admitted for permanent residence be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before [illegible] 9 1975 or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Hong Kong on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to the Republic of China on Taiwan.

Edward P. Imamul

EDWARD P. IMAMUL
Immigration Judge

A-14

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A21 771 341 - New York

FEB 25 1976

In re: CHUNG YING CHAU

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stephen Singer, Esq.
Barst & Mukamal
127 John Street
New York, NY 10038

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: November 25, 1975

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - nonimmigrant visitor for pleasure - remained longer than permitted

APPLICATION: Adjustment of status and permission to reapply for admission

This case presents an appeal from a decision of the immigration judge on June 25, 1975, finding the respondent deportable and granting him the privilege of voluntary departure with an alternate order of deportation to Hong Kong in the first instance and alternatively to the Republic of China on Taiwan. He denied the respondent's applications for adjustment of status and permission to reapply for admission after arrest and deportation. The appeal will be dismissed.

The respondent is a native of China and a citizen of the Republic of China on Taiwan, who last entered the United States in January 1973 as a nonimmigrant visitor for pleasure, after having been deported in March 1971 (Ex.16). He was authorized to remain in this country until November 5, 1974. Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge noted that this is the second time the respondent has necessitated deportation proceedings and that he had reentered the United States with knowledge that permission for him to do so had been specifically denied by the District Director in May 1972 (Ex.14). Noting also that the respondent is statutorily ineligible for adjustment of status in any event because he remains excludable, the immigration judge denied the respondent's application for such relief in view of the many adverse factors which are not offset by unusual or outstanding equities, citing Matter of Arai, 13 I&N Dec. 494 (BIA 1970). He also denied the respondent's request for permission to reapply for admission under section 212(a)(17) of the Act for the same reasons.

Upon review of the record, including counsel's contentions on appeal, we conclude that the immigration judge's denial of relief under both sections 245 and 212(a)(17) was a proper exercise of his discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 34 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Acting Chairman

A-16

INTERPRETER RELEASES

An Information Service
on Immigration, Naturalization and Related Problems

AMERICAN COUNCIL FOR NATIONALITIES SERVICE

20 WEST 40TH STREET, NEW YORK, N. Y. 10018

Edith Lowenstein
Editor

Vol. 50, No.33
August 7, 1973

REMEDIES AND RELIEF IN THE IMMIGRATION AND NATIONALITY ACT

by

Oswald I. Kramer *
Deputy Regional Commissioner, Northeast Region
Immigration & Naturalization Service, U.S. Department of Justice

When aliens change their status to acquire permanent residence in the United States, they may meet all of the eligibility requirements for adjustment of status, but nevertheless may be subject to the exclusion provisions of the law set forth in sec. 212(a) of the Immigration and Nationality Act. I would like to address myself to the relief available for the ground of exclusion which may be utilized in conjunction with the adjustment application, or even perhaps obviate the need for an adjustment application, to reach the goal of permanent residence.

Permission to Reapply for Admission

The first type of relief that I wish to take up is that of Permission to Reapply for Admission, an application which is being filed in increasing numbers and somewhat tending to parallel the increase in deportation activity.

* The presentation made by Mr. Kramer is the eighth of a series made on the occasion of the Annual Conference in Los Angeles, California of the Association of Immigration and Nationality Lawyers, from May 23 to May 27, 1973.

Sections 212(a)(16) and (17) of the Act provide that an alien who has been excluded and deported form the U.S. may not reapply for admission within a year of the deportation or if arrested and deported not ever thereafter without first having received the permission of the Attorney General to do so. The latter preclusion also applies to aliens who have fallen into distress and have been removed at government expense or who were unable to pay their way out of the U.S. voluntarily and whose way was paid for by the government.

There is also, in section 276, a criminal sanction against an alien who violates or attempts to violate this requirement, and under section 237(b)(6) a fine sanction against a carrier who knowingly brings such an alien to the U.S. To complete the statutory references, there is also in section 242(f) a provision which permits the reinstatement of a prior executed order of deportation where the original order was predicated on any of certain specified grounds of deportation.

When considering an application for permission to reapply, your first question should be, "Does he really need it" and a corollary question, "Does he already have it." With some frequency we find that applications are submitted by aliens who have not been arrested and deported. A common situation is that the alien departed the U.S. before an order of deportation became effective, typically while a voluntary departure authority was exercisable.

There are other situations in which permission to reapply may not be necessary. There were periods during which blanket waivers were in effect by regulation. Also, and this is particularly relevant in the Southwest Region, where the removal of an alien was often by the government for its convenience and without regard to the alien's ability to pay. As the government's practice has varied in the latter situation, exploration of the procedure followed in the particular alien's case should be explored.

When reviewing your client's immigration history, you may conclude that the prior deportation would not now occur because of a change in law or interpretation. Generally you will not be permitted to attack the prior order except if you can demonstrate that otherwise there would be a gross miscarriage of justice. often a subjective determination.

A crewman whose conditional permit to land was revoked under section 252(b) and who was deported under that section is considered to be within the excluding provision and to require permission.

There are no statutory requirements to be met when applying for permission to reapply and none are required by regulation. Thus, good moral character is not a requirement and section 101(f) definitions are not binding. However, the application is discretionary, and moral character would be a relevant factor in determining whether the favorable exercise of discretion is warranted.

In a precedent decision of relatively ancient vintage in this field, Matter of H.R., 5 I&N Dec. 769, the Service set forth its position that an applicant must show (1) unusual hardship to a person in the U.S. or (2) need for the alien's services or (3) that he is a bona fide crewman who must pursue his occupation for his livelihood or (4) that it is necessary for him to cross the border to purchase the necessities of life, or in connection with business or other urgent reason. The Service also indicated that inadmissibility was also to be considered and whether any fraud that was perpetrated would be a bar to admission.

However, administrative practice has varied widely during the intervening years. As I indicated earlier there have been blanket waivers and at one time the Department of Justice recommended elimination of the permission to reapply ground of exclusion. It no longer does. During another period, the governing criterion was whether the meritorious features in the case were outweighed by the presence of fraud in the alien's dealings with the government. Currently, determination is made on a weighing of all factors which bear on the exercise of discretion. Among the favorable factors would be those enumerated in the old precedent decision referred to earlier, other humanitarian aspects, close family ties, and lengthy residence in U.S. Among unfavorable factors would be fraud, Undesirability because of criminal, immoral or subversive tendencies, and repeated violation of the immigration laws.

One factor that may receive greater consideration than heretofore relates to payment of the costs of deportation. In a recent movie, very entertaining by today's standards, "Avanti", which takes place in Italy, one of the characters is an Italian maintenance man who had been deported from the U.S. At one point he refers to the United States with great affection as a country which deports you "first class". Well, should he be permitted to return without making the U.S. whole?

Of course, if your client desires to enter only for a temporary period, an application for a section 212(d)(3) waiver would be appropriate. The grant of such a waiver would permit entry as a nonimmigrant but would not be a grant of permission to reapply which would still be required if permanent residence is sought.

If the alien is mandatorily excludable on some other ground, permission to reapply will routinely be denied. However, where there appears to be a genuine issue of excludability, which the consul will not consider in view of the need for permission to reapply, permission to reapply has been granted in order to permit the consul to consider the issue in connection with a visa application and later by the immigration officer at the port of entry.

Once granted, the permission to reapply is unconditional. It eliminates the deportation thereafter as a ground of exclusion. If the deportation was predicated on the failure of the alien to register as an alien under section 241(a)(5), the grant of permission to reapply also operates to erase that ground of deportability should the alien reenter. If the alien is excludable on a ground for which a waiver may be obtained, the application for permission to reapply is ordinarily handled jointly with the waiver application.

Generally the application is handled administratively. However, it may also be sought in deportation or exclusion proceedings with one exception. As I read the regulation where the alien is seeking advance permission to reapply prior to his departure from the U.S., he may not renew his application before an Immigration Judge after it has been denied administratively. However this issue may receive Board consideration shortly.

A novel decision in this area was recently entered in the Fifth Circuit, and I call your attention to it. The case is U.S. against Wong Kim Bo, 466 F. 2d, 1298, and 472 F. 2d, 720 (upon rehearing). Bo (referred to by the literary Chief Judge Brown as a many named alien as a shorthand for his many aliases) was the subject of an alternate voluntary departure and deportion order. He waited until the last day of voluntary departure time and then found that he

could not get a flight out of the U.S. A call to the immigration office on his behalf was allegedly answered that deportation on the following Monday would be satisfactory. He left that Monday and later again returned with false documents (of which he had not been dispossessed) and was found in the U.S. Against administrative urging he was prosecuted for violating section 276.

Without reaching the issue of whether the alien had been deported, the court found that the alien had not been "arrested" as required by the statute. The court found that there were two arrest provisions in the Act, in sections 242 and 243 and concluded that Congress contemplated that the arrest required for prosecution purposes under section 276 is the one under section 243 - an arrest under the warrant of deportation which would alert the alien to the consequences of returning to the U.S. without permission to reapply.

Ironically the Service had been concerned when it initiated the procedure of instituting deportation proceedings by order to show cause instead of the traditional warrant of arrest that this might adversely affect prosecutions under this section. The Bo decision did not challenge this procedure and on the contrary encouraged its continuation as humane. But it did find that the statute referred to a different arrest. Much of the concern of the court was generated by the criminal sanction but in view of the similarity in language to the excluding provision, the decision may well spill over to that ground. Because of the government's concern expressed to the court, the court did conclude its opinion by saying that its decision really changed nothing because what it had done was to make the Service comply with its own regulations which required the issuance of a warrant of deportation, something the government had failed to do in this instance.

Return to Unrelinquished Domicile of Seven Consecutive Years

A second potential avenue of relief is section 212(c), the old "7th Proviso" of the Immigration Act of 1917. This section provides that a lawfully resident alien who leaves the U.S. temporarily, voluntarily, and not under an order of deportation, and who is returning to an unrelinquished domicile of 7 consecutive years, may be readmitted in the discretion of the Attorney General. The section permits the waiver of all but the subversive grounds of exclusion.

The first critical element is the existence of a lawful admission for permanent residence upon which to bottom the claim of relief. And this status must not have been altered. Such status can be formally changed under section 247 but this occurs in very limited situations. Would it be changed by reason of the alien having become deportable because of an occurrence after entry? If he became deportable because he was excludable at entry he would, of course, not be a lawfully admitted permanent resident. However, if the deportable ground arose after entry, his lawful admission would stand up to support a section 212(c) waiver.

If the alien departs from the U.S. less than seven years after he has made his lawful admission, he may nevertheless be eligible for the waiver upon applying for readmission more than 7 years later. Physical presence is not the requirement. Of course, if the abscence is protracted, whether domicile was retained would be a matter for exploration.

Office of the Commissioner
Immigration and Naturalization Service

Establishment of Operational Priorities FY 1975

In order that the Immigration and Naturalization Service can perform effectively the principal tasks for which it is responsible with the limited resources available to it, I have directed that all offices follow the priorities listed in this directive in accomplishing the mission and programs of this Service.

This order is effective September 30, 1974.

"Operational Instructions" will be prepared reflecting these new priorities and will be distributed to all offices in the near future.

L.F. Chapman, Jr.
Commissioner

October 15, 1974

As vacancies occur at the following 22 one-man ports-of-entry, the ports will either be closed or the U.S. Customs Service will be allowed to inspect on I&NS's behalf:

Montana	Washington	Minnesota	North Dakota
Opheim	Boundary	Ely	Ambrose
Scobey		Pinecreek	Antler
Turner		Roseau	Hannah
Del Bonita			Hansboro
Morgan			Maida
Whitetail			Sarles
Wildhorse			St. John
Willow Creek			Sherwood
			Westhope
			Carbury

6. This order will be followed by detailed instructions to the Regional Commissioners about the movement of positions, the authority of the Regional Commissioners to realign positions and the occupations from which the positions being transferred to the Mexican border will be drawn.

ADJUDICATIONS

B-2 Ineligible for Extension of Stay

An amendment will be issued to 8 CFR to add B-2's, temporary visitors for pleasure, to those classes *ineligible* to apply for or receive extensions of their temporary stay in the United States. A notice of proposed rule making has been published to that effect.

Priorities

1. First priority will be given to cases involving:

   - Detained aliens;
   - aliens under deportation proceedings;
   - orphan petitions;
   - suspected fraud (e.g., sham marriages, fraudulent job offers and evidence of work experience submitted in connection with 6th preference petitions and Section 245 adjustment cases);
   - applications which, if neglected, would give the applicant by default all or more than he asks (e.g., extension of stay or change of nonimmigrant status;

- applications for documents to travel (e.g., reentry permits, alien registration receipt cards) when the date of travel is imminent *and only when* the travel is for emergency reasons, and

- nonimmigrant petitions when imminence of required services or training indicates need for high priority.

2. Second priority will be given to:

- Applications such as those for waivers of grounds of inadmissibility under sections 212(g), (h), and (i);

- I-130 and I-140 petitions where fraud is not suspected;

- nonimmigrant petitions, except where imminence of required services or training indicates need for higher priority;

- Section 245 adjustments where fraud is not suspected;

- Section 13, Act of September 11, 1957 adjustment cases;

- Section 214(d) fiance(e) adjustment cases;

- Border Crossing Cards;

- petitions for school approvals;

- applications for advance permission to return, and

- beneficiaries of private bills where the Congressional Committee has asked for a Service report.

3. The lowest priority will be given to:

- Applications for adjustment under Section 1, Act of November 2, 1966 and Section 249 Creation of Record of Lawful Admission Cases;

- applications for permission to reapply after deportation;

- applications for Alien Registration Receipt Cards where not needed for imminent travel;

- Section 247 changes from immigrant to nonimmigrant;

- applications for U.S. Citizen Identification Cards, and

- bond breaches and cancellations.